to retain possession of the premises, and cannot be assigned. In Roe v. Russell[3], it was decided that a statutory tenant could not assign or sub-let his tenancy of the whole of the premises, whether for value or not .... And in Keeves v. Dean[4], Bankes, L.J. said: 'His right is a purely personal one, and as such, unless the statute expressly authorises him to pass it on to another person, must cease the moment he parts with the possession or dies' ";

and he held in that case that a statutory tenancy is not "property" within section 167 of the Bankruptcy Act, 1914, which is equivalent to section 2 of our Bankruptcy Ordinance. It seems to me therefore that if a statutory tenancy is not to be considered "property" or an asset of a bankrupt statutory tenant, it cannot be considered as an asset of the partnership in the present case.

I would allow the appeal with costs here and below.

Appeal allowed.

LIM KEE BUTT v. PUBLIC PROSECUTOR

[A. Cr. J. (Bellamy, J.) August 13, 1953]

[Malacca — Criminal Appeal No 10 of 1953]

Penal Code, s. 409 — Criminal Breach of Trust by public servant — Circumstances under which a Government servant is considered a public servant within the meaning of s. 21 Penal Code.

The appellant had been convicted of Criminal Breach of Trust as a public servant. He was a temporary Government clerk employed in a Police Station and was found to have received money from persons who tendered composition for alleged traffic offences under the Emergency (Compounding of Traffic Offences) Regulations 1948. The important point raised in this appeal was whether a Government servant is necessarily a public servant within the meaning of section 21 of the Penal Code.

Held: unless the appellant comes within the description "'officer' in the service or pay of Government", he is not a public servant. To be an officer he should have in some degree delegated to him certain functions of Government. The only person vested with authority to compound offences or to receive payments in composition under the Emergency (Compounding of Traffic Offences) Regulation 1948, are the Chief Police Officer and any other police officer authorised by him in writing. The appellant was not a police officer nor was he authorised to reserve composition money. He was therefore not an 'officer' in the service or pay of Government within the meaning of section 21 Penal Code.

Cases referred to:—

(1) *Regina v. Ramajirav Jivbajirav* (1875) 12 Bom. H.C.R. 1.

(2) *Ahad Shah v. Emperor* (1948) A.I.R. Lahore 152.

(3) *Rex v. Robinson* (1917) 2 K.B. 108.

CRIMINAL APPEAL.

C. S. Jayaswal for the appellant.

L. A. Massie (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Bellamy, J. : — The appellant, who was at all material times a temporary clerk in the service of Government and was employed as such in the office of the Police Station at Jasin, was charged before the President of the Sessions Court at Malacca under section 409 of the Penal Code with having committed criminal breach of trust, as a public servant, of sums totalling $70 being cash received by him between the period from 21st January, 1952 to 1st January, 1953 in the office of the police station from persons suspected of having committed traffic offences who tendered the amounts in payment of offers of composition made under the provisions of the Emergency (Compounding of Traffic Offences) Regulations, 1948. He was found guilty as charged, convicted and sentenced to one month's imprisonment and to a fine of $100. He now appeals against both conviction and sentence.

The first question which I have to consider on this appeal is whether the appellant was at the material time a public servant. It is, I think, evident from the decision of the learned President to convict the appellant under section 409 of the Penal Code that he was of opinion that the appellant was a public servant. He gives no reason for his opinion in his grounds of decision. He does, however, refer to the appellant as being a "Government servant", and I can only assume that, if he gave this aspect of the case any attention at all, he held that the appellant was a public servant within the meaning of section 21 of the Penal Code by reason of that fact. In my opinion, he was wrong in this view.

Section 21 of the Penal Code sets forth the description of persons who are "public servants" within the meaning of the Penal Code. I think that it must be conceded that, unless the appellant comes within the description "officer in the service or pay of Government" to be found at the end of the ninth clause of that section, he is not a public servant. That the appellant was in the service and in the pay of Government there is no question; but was he an "officer"? The meaning of the term "officer" in section 21 of the Indian Penal Code, which is in *pari materia* with section 21 of the local Penal Code, was considered by the learned Judges in the case of *Regina v. Ramajirav Jivbajirav*[1], where West, J. observed :—

"An officer is one to whom is delegated, by the supreme authority, some portion of its regulating and coercitive powers, or who is appointed to represent the State in its relations to individual subjects. This is the central idea; and applying it to the clause which we have to construe, we think that the word 'officer' there means some person employed to exercise to some extent and in certain circumstances, a delegated function of Government. He is either himself armed with some authority or representative character, or his duties are immediately auxiliary to those of some one who is so armed."

This view was affirmed in *Ahad Shah v. Emperor*[2], where the Court stated in its judgment on page 157 :—

"But it is not enough that a person should be in the pay or service of Government to constitute him a public servant within the meaning of section 21 (ninthly) I.P.C. He must also be an 'Officer'. That expression is not, of course, to be restricted to its colloquial meaning of a Commissioned or non-Commissioned Officer; it means a functionary or holder of some 'officium' or office. The office may be one of dignity or importance; it may equally be humble. But whatever its nature, it is essential that the person holding the office should have in some degree delegated to him certain functions of Government."

I respectfully agree with these views. Let us apply the principle laid down in these cases to the case under consideration.

The Emergency (Compounding of Traffic Offences) Regulations, 1948 provides for the composition of certain traffic offences. Regulation 2(1) of these Regulations reads :—

"(1) The Chief Police Officer in any State or Settlement and any police officer authorised by him in writing in that behalf, may, in his discretion, compound any of the offences against the Proclamation and the Regulations specified in the First Schedule to these Regulations, by collecting, in the manner hereunder specified, a sum of money not exceeding twenty dollars from the person reasonably suspected of having committed the same."

And Regulation 2(3) reads :—

"(3) When an offer of composition of any offence is made and accepted, payment shall be made by cash, money order or postal order to the Chief Police Officer or other police officer authorised to make such offer of composition, who shall issue a receipt for the payment made to the person to whom the offer of composition was made."

The wording of these regulations is clear and unambiguous. The only persons vested with authority to compound offences and to receive payment when offers of composition are accepted are the Chief Police Officer in any State or Settlement and any other police officer or officers to whom such a Chief Police Officer may in writing have delegated such authority. It is plain that a Chief Police Officer is not empowered to delegate his authority under these Regulations to any person other than a member of the Police Force, e.g., he could not lawfully delegate it to a civilian employed in the Police Force; and it is equally plain that a member of the Force whom a Chief Police Officer has authorised in writing to act under these Regulations has no power to delegate such powers to any other person.

The appellant who has been convicted as a public servant was a temporary clerk in the office of the police station at Jasin. The precise nature of his duties is not stated in evidence, but one of his duties would appear from the evidence of Che Zamani bin Samah, the Officer in Charge of the Police District, Jasin (witness 10), to be that of filling in of the particulars in the printed forms of offers of composition, including on occasions the amount to be paid which would have been given to him by Che Zamani beforehand, and of placing of such offers of composition when completed before Che Zamani for his signature. The appellant had no authority whatsoever from Che Zamani to receive payment when offers of composition were accepted. The person authorised, quite illegally in my view, to accept payment of offers of composition when accepted was the Chief Clerk of the station who, without any authority, appears to have passed on these duties to the appellant. It is, I think, plain from these facts that the appellant, though clearly in the service and pay of Government could not possibly be said to be exercising "any delegated function of Government".

The appellant's immediate superior in the office was the Chief Clerk whose orders, given without authority, to accept payments of offers of composition he carried out. This Chief Clerk was certainly not armed with any legal authority to accept payments, and it follows, in my view, that the duties thrust upon the appellant by the Chief Clerk were not "immediately auxiliary to those of some person who is so armed". For these reasons I have no doubt that in the circumstances of this case the appellant was not a public servant within the meaning of section 21 of the Penal Code. This being my view, the conviction under section 409 must be set aside.

I have been asked to take additional evidence under section 311 of the Criminal Procedure Code. This evidence relates to a medical certificate issued by a Dr. Vanar, who was called as a witness for the accused, and which the accused was unable to produce at the time of the trial. Dr. Vanar, however, could have produced a duplicate of that certificate, subject to proof of the loss of the original. As observed by Lord Reading, L.C.J., this jurisdiction must always be exercised with great care (*Rex v. Robinson*[3]), and I am satisfied that such additional evidence is not necessary in this case. There was abundant evidence that the appellant received the monies in question and converted the same to his own use. The conviction, therefore, is altered to one under section 406 of the Penal Code.

No argument has been addressed to me on the question of sentence, with which I see no reason to interfere.

The result is that the appeal is dismissed. The conviction is altered to one under section 406 of the Penal Code and the sentence is maintained.

Appeal dismissed.